

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1145

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1145

UNITED STATES OF AMERICA,

Appellee.

—v.—

ROBERT ELLIS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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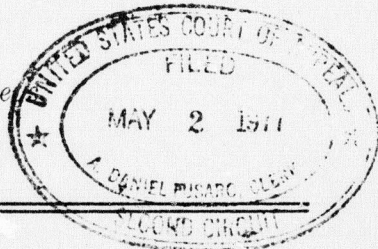


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ROBERT ELLIS,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Robert Ellis appeals from an order entered in the United States District Court for the Southern District of New York, on January 24, 1977, by the Honorable Charles H. Tenney, United States District Judge, denying his motion pursuant to Fed. R. Crim. P. 35 for reduction of sentence.

Indictment 76 Cr. 297 was filed on March 29, 1976 in five counts. Count One charged Ellis with conspiracy to distribute heroin and cocaine in violation of Title 21, United States Code, Section 846; Count Two charged him with the distribution of cocaine to a minor, in violation of Title 21, United States Code, Section 845; and Counts Three through Five charged Ellis with three distributions of cocaine, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

On June 14, 1976, Ellis withdrew his previously entered plea of not guilty and entered a plea of guilty to Counts Three through Five of the indictment. On August 26, 1976 Judge Tenney sentenced Ellis to terms of imprisonment of six years on each of the three counts, to run concurrently and to be followed by a special four-year parole term.* The court also provided for parole pursuant to Title 18, United States Code, Section 4208(a)(2) (1970, now Title 18, United States Code Annotated, Section 4205(b)(2) (Supp. 1977)).**

On December 21, 1976, Ellis moved for a reduction of his sentence pursuant to Fed. R. Crim. P. 35, following denial of parole by the Parole Commission on October 8, 1976. By an endorsement order, entered on January 24, 1977, Judge Tenney denied this motion.

Ellis is presently serving his sentence.

STATEMENT OF FACTS

Indictment 76 Cr. 297 charged Ellis with conspiracy to conduct an extensive narcotics business for the sale of cocaine from a Harlem variety store owned and operated by him. The Government was prepared to prove at trial—and made known to the court at sentencing—that Ellis was a major narcotics dealer, whose illicit dealings

* The remaining counts were dismissed at sentencing.

** The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 (1976), reenacted the existing provisions of section 4208(a)(2) as section 4205(b)(2). S. Rep. No. 94-369, 94th Cong., 1st Sess. 22, *reprinted in* [1976] U.S. Code Cong. & Ad. News 335, 344. For simplicity, all statutory references herein are to the new codification. Similarly, all references to the parole authorities are to the United States Parole Commission, which was established by the Act to replace the United States Board of Parole.

brought him thousands of dollars each week from the sale of drugs. Ellis' customers consisted of neighborhood residents, including many youths. (Government's Sentencing Memo at 3-4).^{*} Two of the counts of the indictment to which Ellis pleaded guilty concerned cocaine sales observed or recorded by government agents; the third count involved a direct sale of cocaine by Ellis to an undercover agent.

At Ellis' sentencing on August 26, 1976, his attorney made a plea for leniency. Judge Tenney, recognizing the harm to the community created by Ellis' trafficking in drugs, (App. 11-12**), thereafter imposed a sentence of six years' imprisonment. At the conclusion of the proceeding, the District Court added the following:

"THE COURT: The sentence I imposed under 4208A. If he behaves himself, he *may* get an earlier release." (App. 18-19). (Emphasis supplied).***

Ellis surrendered to commence his prison term one week later.

On October 8, 1976, approximately five weeks after Ellis commenced the service of his sentence, the Parole Commission conducted a review of Ellis' case, as required by Title 18, United States Code Annotated, Section

^{*} The Government's proof also would have established that Ellis' narcotics activity included the supply and purchase of quinine and lactose, both of which are used as "cutting" agents to increase the volume of heroin or cocaine for street sale.

^{**} References to defendant Ellis' Appendix are cited as "App."

^{***} At the time of sentencing Judge Tenney mistakenly referred to imposition of the sentence under section 4208(a), instead of to the then applicable provision, section 4205(b)(2). This error was later corrected by the filing of the judgment of conviction which referred to the appropriate section. (App. 6).

4208(a) (Supp. 1977). The Commission concluded that parole was inappropriate at such an early date and scheduled another hearing—as envisioned by section 4208(h)—for April, 1978, eighteen months thereafter. The Commission also advised Ellis that the application of its guidelines to his case suggested a likely release after he had served some 36-48 months of his six-year sentence. (App. 34).

Ellis then moved before Judge Tenney on December 21, 1976 for an order pursuant to Fed. R. Crim. P. 35 reducing his sentence. (App. 20). Ellis contended that the Parole Commission's decision thwarted the expectations allegedly relied upon by the sentencing judge, and asked the District Court to adjust his sentence so that the actual term of confinement would be consistent with that initially intended by the court. (App. 21-23). Judge Tenney, who had sentenced Ellis only five months earlier, denied Ellis' motion with the following endorsement:

"This Court, having received a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35 and, having given due consideration to the request and to the pertinent circumstances, concludes that the sentence should stand as is.

Accordingly, the motion for reduction of sentence is denied."*

* Although not reproduced in the appendix prepared by Ellis, the endorsement appears on Ellis' motion and is included in the record on appeal.

ARGUMENT

The District Court's Denial of Ellis' Motion Was Within the Broad Scope of Discretion Conferred by Rule 35 and Was Not Inconsistent With the Court's Original Sentence.

On this appeal Ellis contends that Judge Tenney's denial of his motion under Fed. R. Crim. P. 35 was erroneous because the experienced trial court did not adjust his sentence to take into account subsequent developments that occurred at the Parole Commission stage. Ellis claims that, as matters now stand, the District Court has permitted the Parole Commission to upset the court's own sentencing intentions. These arguments are both illogical and incorrect.

Ellis' central claim is that since the District Court determined that his eligibility for parole was to be governed by 18 U.S.C.A. § 4205(b)(2) (Supp. 1977), rather than under other paragraphs of section 4205 which are perceived to provide for harsher parole treatment,* the Parole Commission's reference to its guidelines, which suggest 36-48 months' confinement in Ellis' case, must be inconsistent with what Judge Tenney intended to accomplish at sentencing.

The compelling answer to this argument is that Judge Tenney rejected the existence of such an inconsistency when Ellis asserted it as the ground for his Rule 35 motion. Having asked the District Court whether its expectations were thwarted by the action of the Parole

* Section 4205(a) provides for parole eligibility after a prisoner has served one-third of his term. Section 4205(b)(1) provides for parole consideration after a minimum term of confinement set by the court.

Commission and having received a negative response, Ellis has no possible basis for complaint in this Court. Indeed, the Third Circuit has noted in a similar case that appellate review in such circumstances is narrow, for "there can be no better evidence of a sentencing judge's expectations or intent than his own statement. . . ." *United States v. Somers*, 20 Crim. L. Rep. (BNA) 2545, 2546 (3d Cir., Mar. 30, 1977).

Moreover, given the fact that the question was squarely placed before Judge Tenney—with reference to the Parole Commission's actions and guidelines—and rejected by him, Ellis' considerable efforts to fold this case within *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975) must fail. This Court found in *Slutsky* that the defendant "in all probability . . . will not receive the parole treatment envisioned by the sentencing judge," 535 F.2d at 1229, and remanded to the District Court for resentencing. Although Slutsky's parole eligibility was governed by § 4205(b)(2), the Parole Commission deferred a meaningful review of his case to the one-third point of his sentence, at which time he would have been considered for parole even had the defendant received a regular sentence under § 4205(a). *Id.* The Commission's decision was made pursuant to guidelines and regulations of which the District Court had been unaware at the time of sentence and which had not been brought to the court's attention in the Rule 35 proceeding. 535 F.2d at 1227. In view of such interim developments and the fact that the guidelines had never been brought to the District Court's attention, this Court in *Slutsky* found that the reasonable expectations of the District Court could not be determined and might have been foiled by the Parole Commission's action. Accordingly, the Court remanded for further consideration by the sentencing judge.

The predicate of this Court's decision in *Slutsky* is entirely absent in this case. Judge Tenney imposed sentence on Ellis on August 26, 1976, long after the Second Circuit Conference in September, 1974 at which the parole guidelines were brought to the attention of the judges in this Circuit. *United States v. Slutsky, supra*, 514 F.2d at 1227, n.17. And, of course, the application of the guidelines was the specific ground of the Rule 35 motion addressed to the sentencing court in this case. Thus, it is simply not possible for Ellis to show, as he must to come within *Slutsky*, that his parole consideration "is likely to depart substantially from what . . . were the reasonable expectations of the district judge." 514 F.2d at 1227. Indeed, he has already directly been told by Judge Tenney that there is no inconsistency.*

The other decisions cited by Ellis are equally inapplicable to his situation for, unlike this case, they turn on evident contradictions between the Parole Commission's guidelines and the expressed intent of the sentencing court in each specific case.** To the contrary, Ellis'

* Nothing in Judge Tenney's brief phrase at the sentencing proceeding, "[i]f he behaves himself, he may get an earlier release," (App. 19), is inconsistent with the District Court's denial of Ellis' Rule 35 motion. First, Ellis already had received much earlier parole review than would have been the case under 4205(a). Second, a release in advance of the date suggested by the guidelines still may be approved for Ellis. The regulations explicitly provide that the Commission may render decisions outside the guidelines in certain circumstances, presumably including exceptional institutional performance. 28 C.F.R. § 2.20 (c) (1976). Third, Ellis will meet the Parole Commission again in April, 1978, considerably earlier than the one-third review otherwise mandated under a 4205(a) sentence. See *infra* at 8-9.

** In *United States v. Jackson*, 410 F. Supp. 1240 (D. Md. 1976), for example, the Parole Commission had ignored the specific request of the District Court that the defendant be afforded consideration for parole after serving two years of his term. Sim-

[Footnote continued on following page]

situation is directly analogous to a related series of opinions in which the District Courts, confronted with claims identical to those raised here, have explained that the Parole Commission's actions were perfectly consistent with their sentencing expectations and therefore rejected requested reductions in sentence. See, e.g., *United States v. Cardillo*, Dkt. No. 76 Cr. 430 (S.D.N.Y., Mar. 8, 1977), (Pierce, J.) slip op. at 5 ("this Court, in imposing sentence, was fully aware of the extent of discretion which § 4205(b)(2) affords to the Parole authorities"); *Kramer v. United States*, 409 F. Supp. 1402 (N.D. Ga. 1976).

Ellis further argues that the Parole Commission's actions demonstrate that future parole consideration will be meaningless and thus inconsistent with Judge Tenney's expectations. This contention is both groundless and premature.

This Court has determined that the purpose of a sentence imposed under § 4205(b)(2) is to assure "that serious and meaningful parole consideration will be given to the prisoner by the Parole Board at an earlier date than the one-third point of his sentence permitted by 18 U.S.C. § 4202." *Grasso v. Norton*, 520 F.2d 27, 33 (2d Cir. 1975). See *Garafola v. Benson*, 505 F.2d 1212, 1217-18 (7th Cir. 1974). Such consideration is precisely what the record presently shows Ellis will receive from the Parole Commission. He is already scheduled to have a parole determination proceeding in April, 1978—a full

ilarly, the court in *United States v. Manderville*, 396 F. Supp. 1244 (D. Conn. 1975), held that the Parole Commission's decision to require the defendant to serve his entire sentence undermined the court's expectations at sentencing. And *United States v. Wigoda*, 417 F. Supp. 276 (N.D. Ill. 1976), also involved the continuation of the defendant's case by the Parole Commission until the expiration of his sentence in contravention of the intent of the sentencing court.

five months in advance of the one-third point of his six-year sentence. Ellis' concern for what may transpire before the Parole Commission a year from now (Br. 7-8) hardly establishes the basis of a claim for relief at this time. While the guidelines suggest that he may not be released next April, there nevertheless remains considerable flexibility in the parole decision. The Commission's regulations specifically provide that the guidelines are in no way binding, 28 C.F.R. § 2.20(c) (1976), and that the factors which determine the applicable guideline may be flexibly evaluated, 28 C.F.R. §§ 2.20(d), (e) (1976). Indeed, this Court recognized in *United States v. Slutsky, supra*, that the Parole Commission is fully capable of providing meaningful consideration to a prisoner's eligibility for parole at a review proceeding conducted well in advance of the date suggested for release by the Commission's guidelines. 535 F.2d at 1228-29.* Nor are the guidelines themselves incompatible with the discretion afforded the Parole Commission under § 4205(b)(2). See *Grosso v. Norton, supra*.

Finally, it bears particular emphasis that the scope of this Court's review of Judge Tenney's order is exceedingly narrow. The District Court enjoys a broad discretion in passing upon Rule 35 motions, as well as in the

* Congress has made plain its intention that the Commission at its next review "focus upon those items [bearing on the parole decision] which have changed, or which may have changed, in the intervening time" since the initial denial of parole, H. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 30, reprinted in [1976] U.S. Code Cong. & Ad. News 351, 363, and the Parole Commission has incorporated that requirement in its own regulations, 28 C.F.R. § 2.14(a) (1976). Accordingly, it is likely that the proceeding in April, 1978, will focus on Ellis' institutional progress, the chief item which may have changed since his first review, and the very subject Ellis claims the Commission will ignore. (Br. 9). And, should Ellis' speculation turn out to be correct, the proper recourse would be to pursue remedies against the Parole Commission at that time.

imposition of the underlying sentence. *United States v. Slutsky*, *supra*, 514 F.2d at 1226; *United States v. Jones*, 444 F.2d 89 (2d Cir. 1971) (*per curiam*).

The sentence here was well within the terms set by 21 U.S.C. § 841(b)(1)(A) (1970), and Ellis makes no claim that the sentencing court relied upon misinformation or improper factors of constitutional magnitude or otherwise. See *Dorszynski v. United States*, 418 U.S. 424, 431 (1974); *United States v. Mejias*, Dkt. No. 76-1384, slip op. 2269, 2292 (2d Cir., Mar. 10, 1977); *United States v. Dzialak*, 463 F.2d 221, 223 (2d Cir.), *cert. denied*, 409 U.S. 952 (1972). Indeed, measured against other sentences, the term of imprisonment imposed on Ellis was particularly lenient. He was a substantial narcotics violator who pleaded guilty to three very serious criminal charges. He had previously been incarcerated on three occasions, and refused any cooperation with the government in connection with the instant offenses. (Government's Sentencing Memo, at 7). Judge Tenney's imposition of six years' imprisonment, in light of the forty-five year maximum term and \$75,000 fine to which Ellis was subject, leaves him no basis for complaint at the denial of his further "plea for leniency" under Rule 35. *United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968).

Judge Tenney's endorsement order makes clear that the court thoroughly reviewed the pertinent circumstances and found no occasion to extend greater leniency than already clearly had been demonstrated in the original sentence imposed only five months earlier. This decision cannot be said to have been unfair, nor, by any stretch

of imagination, an abuse of the District Court's broad discretion. *United States v. Jones, supra.**

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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* Ellis' apparent suggestion that Judge Tenney's brief endorsement leaves open the question whether the court fully considered the Parole Commission's actions is simply unfounded. The District Court expressly stated that it had considered all of the "pertinent circumstances" and concluded that no further relief was in order. Since the only ground for Ellis' motion was the claimed inconsistency of the Parole Commission's actions with the court's earlier sentencing intentions, it is manifest that Judge Tenney determined that Ellis' possible parole treatment did not conflict with the severity of the sentence he had intended to impose. Furthermore, there is no requirement that the sentencing judge issue a detailed opinion for every routine motion which seeks a discretionary reduction of sentence under Rule 35. This is especially the case where, as here, the court made the reasons for its decision clear at the time sentence was first imposed. (App. 8, 11-12, 13, 16-17). See generally, *United States v. Driscoll*, 496 F.2d 252 (2d Cir. 1974); *United States v. Brown*, 479 F. 2d 1170 (2d Cir. 1973).

AFFIDAVIT OF MAILING

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) ss.:
COUNTY OF NEW YORK)

Richard F. Ziegler being duly sworn deposes
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